Federal Court  Cour fédérale

Date: 20190611

Docket: T-904-19

Citation: 2019 FC 804

Edmonton, Alberta, June 11, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

SHAWNA JEAN

Applicant

and

SWAN RIVER FIRST NATION
AND SWAN RIVER FIRST NATION
CHIEF AND COUNCIL

Respondents

ORDER AND REASONS

[1] Shawna Jean brings this Motion for an interlocutory injunction to prevent the Swan River First Nation (SRFN) from holding a General Election for Chief and Council on June 14, 2019 until the underlying judicial review is determined. Ms. Jean is a member of the SRFN and she challenges the decision of the SRFN Electoral Officer of May 3, 2019 refusing to allow her name to stand for office as she does not meet the residency requirements.

[2] In addition to seeking an injunction to prevent the election from proceeding, Ms. Jean also seeks an Order that the current Chief and Council of the SRFN shall continue to hold office pending the outcome of her judicial review application.

[3] This Motion and a Motion in T-903-19 requesting the same relief were heard together on June 10, 2019 in Edmonton, Alberta.

[4] For the reasons that follow, although I am satisfied that Ms. Jean raises a serious issue, I am not satisfied that she will suffer irreparable harm. Accordingly the balance of convenience favors the Respondents. Therefore the Motion for an interlocutory injunction is denied.

Background

[5] The SRFN general election for Chief and Council was called on April 9, 2019 in accordance with the SRFN Customary Election Regulations (Election Code). The Election Code provides that only SRFN members who have been resident on the reserve for at least one year prior to their nomination are eligible to run for office. More than two-thirds of SRFN members live off reserve.

[6] Ms. Jean attended the nomination meeting on May 3, 2019 with the intention of being nominated to run for the position of Chief. Ms. Jean was denied nomination for not having resided on reserve for at least one year prior to May 3, 2019. The Electoral Officer did not accept Ms. Jean's nomination and confirmed in writing that her nomination was refused because

she had not been residing on reserve for the past year. It is this decision of the Electoral Officer for which Ms. Jean seeks judicial review.

Issue

[7] The sole issue on this Motion is if an injunction should be granted to halt the election currently scheduled for June 14, 2019.

Analysis

[8] In *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*], the Supreme Court of Canada recently restated the test for granting an interlocutory injunction as follows at paragraph 12:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.

[9] The three part test arises from the earlier Supreme Court decision in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] which provides that an applicant seeking an injunction must establish: (1) a serious issue to be tried, (2) that he will suffer irreparable harm if the injunction is not granted, and, (3) that the balance of convenience favors granting the injunction.

[10] This test is conjunctive, meaning all three elements of the test must be satisfied in order to be entitled relief (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 14).

Serious Issue

[11] The issue raised in Ms. Jean's judicial review application is if the residency requirement in the SRFN Election Code contravenes section 15 of the *Charter*. She relies upon *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.

[12] On the serious issue prong of the test, it is sufficient to show that the application before this Court is neither frivolous nor vexatious. This lower threshold is often applied in *Charter* cases and where fundamental issues of public policy are at stake (see *North American Gateway Inc v Canadian Radio-Television and Telecommunications Commission*, [1997] FCJ No 628).

[13] The Respondents rely upon *CBC* to argue that the Applicant must establish a strong *prima facie* case. In *CBC* however the Supreme Court noted that the higher threshold applied when a mandatory interlocutory injunction is sought (at para 15). In my view the injunction sought here, namely to halt an election, is in the nature of a prohibitive injunction and different from *Gadwa v Joly*, 2018 FC 568 where a mandatory injunction was sought.

[14] Although I am of the view that Ms. Jean has established a serious issue based upon the *RJR-MacDonald* test, even if I were to accept the Respondents argument that the *CBC* test applies, I am satisfied that Ms. Jean has also established a strong prima facie case.

Irreparable Harm

[15] Irreparable harm "…refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured…" (*RJR-MacDonald* at para 64).

[16] As recently stated by the Federal Court of Appeal in *Ahlul-Bayt Centre, Ottawa v Canada (National Revenue)*, 2018 FCA 61 at paragraph 15, "It is a long-established principle that irreparable harm cannot be inferred, but must be established by clear and compelling evidence…. General assertions cannot establish irreparable harm." That is, evidence of irreparable harm must be clear and not speculative.

[17] Ms. Jean argues that allowing the election to proceed in light of the *Charter* challenge to the residency requirement which impacts two-thirds of the SRFN membership (those who reside off-reserve) is irreparable harm. She argues that by not halting the current election it could be another 3 years (next election) or until the judicial review is resolved before the residency issue is addressed. She also points to her personal sacrifices in deciding to run for the position of Chief as evidence of harm.

[18] The Applicant relies upon *Kyiow v Mohawk Council of Kahnawake*, 2009 FC 690 [*Kyiow*] where at paragraph 22 the court notes that non-participation in an electoral process cannot be quantified in monetary terms and cannot be remedied in any other manner save for interlocutory relief. However *Kyiow* dealt with a chief that had been in office for over 7 years before being removed, and he was in the process of litigating that removal when the band called

an election and declared him ineligible for nomination due to previous removal. The particular facts of *Kyiow* are distinguishable from this case.

[19] The Applicant also points to various decisions of this Court that have allowed judicial reviews for band electoral issues (see *Cardinal v Bigstone Cree Nation*, 2018 FC 822; *Esquega v Canada (AG)*, 2007 FC 878; and *Clifton v Benton*, 2005 FC 1030). However, these decisions address the merits of the judicial review applications and not interlocutory injunctions.

[20] More to the point is the decision in *Cachagee v Doyle*, 2016 FC 658 [*Cachegee*] where the Court was faced with a similar request. There the applicant sought an injunction when his nomination was rejected for failing to meet residency requirements. Justice Bell states as follows with respect to irreparable harm at para 9:

> I am of the view that Mr. Cachagee's right to challenge this election continues. I am of the view that a Court fully informed of all of the factors would have the jurisdiction to determine the legality of this election and craft an appropriate remedy should it conclude the electoral process to have been unlawful at any stage, including the nomination process. Because of that view, I fail to see the irreparable harm to Mr. Cachagee.

[21] In this case the election process is already underway. Votes have been cast, expenses have been incurred. In the circumstances more harm would result by interfering with the democratic process already underway, even if it is ultimately determined to be a flawed process.

[22] Acceding to the request that an injunction be granted and that the current Chief and council be held in office pending the resolution of the judicial review (and any appeals that may result) has the potential to do more harm to the democratic process as compared to allowing the

current election to procced. As in C*achagee*, the Applicant's right to challenge the residency requirement for election will continue.

[23] Accordingly, on these facts, I am not satisfied that irreparable harm to the Applicant has been established.

Balance of Convenience

[24] The third branch of the test, requiring an assessment of the balance of convenience, will often determine the result in applications involving *Charter* rights (*RJR-MacDonald* at para 85). In addition to the damage each party alleges it will suffer, the interest of the public must also be taken into account. The Supreme Court of Canada in *RJR-MacDonald* explicitly states as follows at paragraph 73:

> When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

[25] The Applicant has not sufficiently demonstrated the risk of harm she faces or how it impacts the public interest. The risk she faces is that of non-participation during the election period and having to wait for their judicial review applications to be adjudicated. The Election Code was democratically adopted by a referendum of the band members and to grant this interlocutory relief would effectively contravene these duly enacted laws.

[26] As noted, the current election is underway, votes have been cast and expenses have been incurred. The balance of convenience does not favor putting the SRFN election process on hold until this matter is resolved.

[27] Therefore in my view the balance of convenience favors the Respondents and favors allowing the election process to continue.

Conclusion

[28] Ms. Jean has not met the three part test to obtain an interlocutory injunction therefore the Motion is dismissed. However, I am satisfied that the underlying judicial review raises a serious issue, therefore I decline to award costs to the Respondents.

ORDER in T-904-19

THIS COURT ORDERS that this Motion for an interlocutory injunction is dismissed without costs.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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